UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CRANBURY BRICK YARD, LLC,	:	
	:	
Plaintiff,	:	Hon. Brian R. Martinotti
	:	
v.	:	Civ. Action No. 15-2789(BRM) (LGH)
	:	
UNITED STATES OF AMERICA, et al.,	:	ORAL ARGUMENT REQUESTED Hearing Date: January 16, 2018
	:	
Defendants.	:	Document Electronically Filed

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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GLOSSARY

ASTM	American Society for Testing and Materials
BFPP	Bona Fide Prospective Purchaser
CBY	Cranbury Brick Yard
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act
EPA	Environmental Protection Agency
Maxxam	Maxxam Group, Inc.
MEC	Munitions and Explosives of Concern
NCP	National Contingency Plan
NJDEP	New Jersey Department of Environmental Protection
PRPs	Potentially Responsible Parties
RCRA	Resource Conservation and Recovery Act
SARA	Superfund Amendment and Reauthorization Act of 1986
UCATA	Uniform Contribution Among Tortfeasors Act
U.S. SOF	United States' Statement of Undisputed Facts

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is brought by a real estate developer, Cranbury Brick Yard, LLC ("CBY" or "Plaintiff"), who in 2006 purchased a contaminated property (the "Site") and assumed cleanup responsibilities for the Site under an Administrative Consent Order Amendment ("Order") with the State of New Jersey. CBY seeks to recover past and future cleanup costs from the United States, alleging that the United States should be held responsible for these costs because a prior Site owner produced munitions at the Site for the United States during and at various times after World War II. *See* Compl. ¶¶ 20-27.

Specifically, CBY pleads two alternate causes of action against the United States under the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9601-75 ("CERCLA"). In its First Claim for Relief, CBY initially alleges an entitlement to recover costs under 42 U.S.C. § 9607(a)(4)(B). Compl. ¶ 78. In its Second Claim for Relief, CBY pleads "in the alternative" that, "[i]f this Court . . . determines that [CBY's] entry into the [Order] constitutes a settlement within the meaning of . . . 42 U.S.C. § 9613(f)(2)," then CBY is entitled to "contribution" under 42 U.S.C. § 9613(f)(3)(B). Compl. ¶ 81.

The United States is entitled to summary judgment on these claims. Under the Third Circuit's decision in *Trinity Indus., Inc. v. Chicago Bridge & Iron Co.*, 735 F.3d 131 (3d Cir. 2013), CBY's entry into the Order clearly gave rise to a contribution claim under 42 U.S.C. § 9613(f)(3)(B) with respect to all response costs CBY has incurred or will incur related to matters addressed in the Order. The statutory remedies provided by §§ 9613(f) and 9607(a) are mutually exclusive, and a claimant in procedural circumstances that give rise to a right of contribution under § 9613(f)(3)(B) cannot "choose" to bring a claim under § 9607(a) instead. Because the Order triggered the statutory right to contribution with respect to costs related to the Order, any claim by CBY to recover those costs under 42 U.S.C. § 9607(a) is precluded. And because CBY waited more than *nine years* after the effective date of the Order before filing its Complaint, its contribution claim is time-barred. *See* 42 U.S.C. § 9613(g)(3)(B). For these reasons, the United States is entitled to summary judgment dismissing the First Claim for Relief as to all costs CBY incurred after the Order's effective date and any pre-Order costs related to matters addressed in the Order, and dismissing the Second Claim for Relief altogether.[1]

The United States also moves for summary judgment on the issue of CBY's liability. CBY contends that although it is the current owner of the Site, it is not a liable party under CERCLA because it is a "bona fide prospective purchaser." *See*

[1] Based on CBY's accounting expert report, the United States understands that CBY seeks pre-Order costs totaling a little over $1 million (plus pre-judgment interest). Because there are factual disputes concerning these costs, the United States does not seek summary judgment on the issue of how much of the approximately $1 million in pre-Order costs is related to the matters addressed in the Order (and therefore is unrecoverable). There can, however, be no credible dispute that the additional costs CBY allegedly has incurred since the Order's effective date were incurred pursuant to (and hence are related to) the Order, as its provisions comprehensively govern cleanup of the Site. *See infra* Argument I.A. (quoting provisions of the Order).

Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss 1, 4, 12-14. CERCLA provides this exemption from liability to current owners who can establish each of eight rigorous statutory criteria. Under the undisputed facts of this case, however, CBY cannot establish at least four of those criteria. Thus, the United States is entitled to summary judgment that CBY is a liable party under CERCLA.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

CERCLA was enacted in 1980 in response to the serious environmental and health dangers posed by property contaminated by hazardous substances. *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). As amended by the Superfund Amendment and Reauthorization Act of 1986 ("SARA"),[2] which added § 9613(f), CERCLA provides two "clearly distinct" types of legal actions through which parties can be held liable for some or all of the costs incurred in connection with the cleanup of a site: (1) actions to recover costs under CERCLA section 107(a), 42 U.S.C. § 9607(a); and (2) actions for contribution under CERCLA section 113(f), 42 U.S.C. § 9613(f). *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 161-63 & n.3 (2004); *see also United States v. Atlantic Research Corp.*, 551 U.S. 128, 138 (2007).

To establish a cost recovery or contribution claim against the United States, CBY must prove: (1) that the United States is a "responsible" or "covered person" as defined in 42 U.S.C. § 9607(a); (2) that hazardous substances were disposed of at a "facility" as defined in 42 U.S.C. § 9601(9); (3) that there has been a release or threatened release of hazardous substances from that facility into the environment; and (4) that the release or threatened release has required or will require CBY to incur response costs. *See New Jersey Turnpike Auth. v. PPG Indus., Inc.*, 197 F.3d 96, 103-04 (3d Cir. 1999). CBY must also prove that such costs are "necessary" and that they are "consistent with the national contingency plan[3] [or NCP]." 42 U.S.C. § 9607(a)(4)(B).

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[2] *See* Pub. L. No. 99-499, 100 Stat. 1613 (1986).

Section 9607(a) of CERCLA identifies four categories of "covered persons" (also known as "potentially responsible parties" or "PRPs") who are liable for response costs: (1) owners and operators of facilities at which hazardous substances are located; (2) past owners and operators of such facilities at the time when disposal of hazardous substances occurred; (3) persons who arranged for disposal or treatment of hazardous substances; and (4) certain transporters of hazardous substances. 42 U.S.C. § 9607(a)(1)-(4). CERCLA imposes strict liability on persons who are within any of these four categories. *See United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 259 (3d Cir. 1992). CBY alleges that the United States' historical actions relating to the Site make it a "past owner" or "operator" and an "arranger." Compl. ¶¶ 62-64.

[3] The National Contingency Plan, a regulation promulgated by the United States Environmental Protection Agency ("EPA"), sets forth the framework under which entities performing CERCLA cleanups respond to releases or threatened releases of hazardous substances, pollutants or contaminants. *See* 40 C.F.R. Pt. 300.

The United States, in turn, alleges that CBY is liable as the current "owner" of the Site. Defendants' Counterclaim ¶ 15.

II. FACTUAL BACKGROUND

CBY was formed by two investors, Viridian Land Investment Partners, LLP ("Viridian") and Lion Industrial Trust ("Lion"), for the purpose of purchasing a 395-acre contaminated property located in Cranbury Township, New Jersey (the "Site"). United States' Statement of Undisputed Facts ("U.S. SOF") ¶ 81, 84.[4] From 1942 through the mid-1950s, Unexcelled Manufacturing Company and its successors (collectively, "Unexcelled") handled munitions and manufactured fireworks at the Site, including various munitions under contracts with the United States military during World War II and the Korean War. *Id.* ¶¶ 1-2. During that time, the Site became contaminated with munitions and explosives of concern ("MEC") and other contaminants. *Id.* ¶ 3.

In December 2004, the New Jersey Department of Environmental Protection ("NJDEP") issued a Directive and Notice to Insurers finding that Maxxam Group, Inc. ("Maxxam"), as successor to Unexcelled, and Cranbury Development Corporation, the Site's then-owner, were liable for cleaning up the Site, and directing them to do so. *Id.* ¶¶ 4-5. Shortly thereafter, in January 2005, Cranbury Development Corporation and Maxxam, along with Credit Agricole Asset Management (as

[4] CBY has no employees; instead, during most of CBY's involvement at the Site, Viridian conducted CBY's day-to-day business. *Id.* ¶ 78.

Cranbury Development Corporation's financier), signed an Administrative Consent Order (the "2005 Order") under which they agreed to perform a remedial action at the Site and reimburse NJDEP's oversight costs. *Id.* ¶¶ 6-13.

In July 2005, CBY entered into a Purchase and Sale Agreement with Cranbury Development Corporation under which CBY would purchase the Site for $5.5 million following a period in which CBY could conduct due diligence activities. *Id.* ¶¶ 14-15. Cranbury Development Corporation transferred title to CBY on January 11, 2006. *Id.* ¶ 17. At around the same time, CBY assumed liability for cleaning up the Site by signing an amendment to the 2005 Order (the "2006 Amendment;" the 2005 Order and 2006 Amendment are referred to collectively as "the Order") under which it replaced Cranbury Development Corporation and Credit Agricole Asset Management as the co-respondent to the Order with Maxxam. *Id.* ¶¶ 30-32, 35-35.

Redacted pursuant to Local Rule 5.3.

At the time CBY purchased the Site and entered into its agreements with Maxxam, Maxxam had a lawsuit pending in this Court against the United States, including the United States Army and Navy (collectively the "United States" or "Defendants") to recover cleanup costs related to the same Site. *Id.* ¶ 39. A CBY representative testified at deposition in that case on June 20, 2006. *Id.* ¶ 80. Maxxam and the United States settled that suit in a 2008 consent judgment, under which the United States resolved its potential CERCLA liability to Maxxam for Site-related costs by paying Maxxam nearly $1.5 million. *Id.* ¶ 39.[5]

Since 2006, CBY has engaged a number of contractors to conduct remediation and development work at the Site. *Id.* ¶ 40.

Redacted pursuant to Local Rule 5.3.

[5] Though the consent judgment resolved the United States' *potential* liability to Maxxam, the United States did not then and does not now concede that it is actually a liable party under CERCLA for costs incurred at this Site. *See, e.g.*, *Maxxam Group, Inc. v. United States*, Case No. 2:05-cv-01834-DMC-MF, 2008 WL 305286, at *5 (D.N.J. Jan. 28, 2008) (concluding that a summary judgment of U.S. liability could not be granted due to material factual disputes); Defendants' Answer at 12 (asserting, as Defense No. 8, that the United States is not liable).

Redacted pursuant to Local Rule 5.3.

Indeed, CBY moved approximately one million cubic yards of soil at the Site, and altered ground elevation by as much as twelve feet in some areas. *Id.* ¶¶ 60-61.

Ultimately, the Site will hold three large warehouses of approximately one million square feet each. *Id.* ¶ 64. CBY plans to install a "supplemental barrier" as part of the remedy at the Site. *Id.* ¶ 41.

Redacted pursuant to Local Rule 5.3

According to Viridian's Director of Development, Steve Ganch, installation of the supplemental barrier and construction of the warehouses is market-driven and will depend on securing lessees for the buildings. *Id.* ¶ 76. At the time of Mr. Ganch's deposition in November 2016, the supplemental barrier was not expected to be complete for several years. *Id.* ¶ 77.

STATEMENT OF THE ISSUES

1. Whether CBY is limited to a contribution claim under 42 U.S.C. § 9613(f)(3)(B), and thus cannot seek cost recovery under § 9607(a)?

2. Whether CBY's contribution claim is time-barred?

3. Whether CBY is a liable party under CERCLA?

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine dispute of material fact and judgment should be granted as a matter of law. Fed. R. Civ. P. 56(a). The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing that the nonmoving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *see also* Fed. R. Civ. P. 56(c)(1). The court must view the facts and any permissible inferences drawn from them in a light most favorable to the opposing party. *Marino v. Indus. Crating Co.*, 358 F.3d 241, 247 (3d Cir. 2004). Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate. *Mid-Jersey Nat'l Bank v. Fidelity-Mortgage Investors*, 518 F.2d 640, 644-45 (3d Cir. 1975).

ARGUMENT

I. CBY IS LIMITED TO A CONTRIBUTION CLAIM FOR ANY COSTS INCURRED PURSUANT TO OR RELATED TO THE ORDER.

Section 9613(f)(3)(B) of CERCLA provides that a person who "has resolved [their] liability to the United States or a State for some or all of a response action[6] or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement

[6] The term "response" is defined to mean "remove, removal, remedy, and remedial action." 42 U.S.C. § 9601(25); *see also id.* § 9601(23) (defining the terms "remove" and "removal"); *id.* § 9601(24) (defining "remedy" and "remedial action").

referred to in [§ 9613(f)(2)]." 42 U.S.C. § 9613(f)(3)(B). This provision clearly applies to CBY, which in 2006 became the owner of the Site and entered into an administrative settlement with the State of New Jersey resolving its potential CERCLA liability to the State arising from its status as the Site's new owner. Whether CBY can prove that it meets the statutory criteria for exemption from such liability as a "bona fide prospective purchaser" is irrelevant; by resolving its *potential* liability under the specific terms of the Order, CBY triggered the contribution right provided in 42 U.S.C. § 9613(f)(3)(B). And, under the controlling law of the Third Circuit as well as that of all other circuits to consider the issue, that contribution right was CBY's *exclusive* CERCLA remedy to recover response costs incurred pursuant to the Order.

A. The Order Plainly Resolves Potential Liability under CERCLA Within the Meaning of 42 U.S.C. § 9613(f)(3)(B).

The terms of CBY's administrative settlement with the State of New Jersey are set forth in the 2005 Order and the 2006 Amendment (collectively, "the Order"). The 2005 Order expressly was adopted to resolve potential CERCLA liability, stating:

> It is the intent of the [parties] that this Administrative Consent Order constitutes an administrative settlement within the meaning of CERCLA Section 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B) and is intended to resolve the liability of [Cranbury Development Corporation] and Maxxam to the State of New Jersey for some or all of a response action as related to the investigation, remediation and Remedial Work described in this Administrative Consent Order at the Site.

U.S. SOF ¶ 8. As discussed below, the 2006 Amendment subsequently replaced Cranbury Development Corporation with CBY.

The Order requires that the response actions at the Site be performed consistent with CERCLA requirements, including the NCP. *See, e.g.*, id. ¶ 10 ("This Administrative Consent Order is, to the greatest extent possible, consistent with and complies with [CERCLA] . . . . The activities conducted pursuant to this [order], if approved by [NJDEP], shall be considered to be consistent with the NCP."). Additionally, the State of New Jersey specifically covenants not to sue the Order's signatories "under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a) with respect to response actions for the investigation, remediation and Remedial Work described in this [Order]." *Id.* ¶ 11. This covenant not to sue makes clear that the legal effect of the Order is to resolve its signatories' potential CERCLA liability to the State at this Site.[7]

The 2006 Amendment expressly was intended to "replace" Cranbury Development Corporation and its financier Credit Agricole Asset Management "with [CBY] as a Respondent to the [2005 Order]." *Id.* ¶ 31. The 2006 Amendment further states that the amendment "shall become part of" the 2005 Order, and that the

[7] The covenant is "conditioned upon . . . satisfactory performance of [the signatories'] obligations under this Administrative Consent Order." *Id.* ¶ 12. Such a condition is routinely included in both administrative and judicially-approved settlements providing for performance of response actions. *See, e.g.*, *ASARCO LLC v. Atlantic Richfield Co.*, 866 F.3d 1108, 1122-25 (9th Cir. 2017).

original terms of the Order—which include the above-quoted covenant not to sue—"shall remain in full force and effect." *Id.* ¶ 34. The amendment became effective on February 16, 2006, when all parties including the State had signed it. *Id.* ¶ 32.

The Third Circuit has held that an administrative consent order requiring a cleanup need not contain language expressly resolving CERCLA liability—or even be issued pursuant to CERCLA at all—in order to give rise to a contribution right under 42 U.S.C. § 9613(f)(3)(B). *See Trinity*, 735 F.3d at 136 ("The statutory language . . . requires . . . the existence of a settlement resolving liability to the United States or a state for 'some or all of a response action' [or some or all of the costs of such action]," but "does not state that the 'response action' . . . must have been initiated pursuant to CERCLA."); *see also ASARCO LLC v. Atlantic Richfield Co.*, 866 F.3d 1108, 1120-21 (9th Cir. 2017) ("*ASARCO II*") (following *Trinity*).[8] Because the Order here *does* include such language, there simply is no question that it gave rise to the contribution right in 42 U.S.C. § 9613(f)(3)(B).

[8] CERCLA defines the operative term "response" (and hence "response action") in a manner that encompasses a broad array of activities, supporting the *Trinity* court's conclusion that an administrative consent order need not expressly invoke CERCLA authority in order for the matters addressed therein to resolve liability "for some or all of a response action or for some or all of the costs of such action." *See supra* at 9 n.6; 42 U.S.C. § 9601(23)-(25); *compare Trinity*, 735 F.3d at 136-37.

B. CBY's Assertion of BFPP Status Does Not Alter the Order's Resolution of *Potential* CERCLA Liability.

CBY alleges that the contribution provision in 42 U.S.C. § 9613(f)(3)(B) is not applicable because CBY entered into the Order for the "the sole purpose" of transferring to itself Cranbury Development Corporation's cleanup obligations, and because the 2006 Amendment was not "intended" to settle CERCLA liability between itself and the State. Compl. ¶ 81. Under *Trinity*, however, it is sufficient that the *terms* of an administrative consent order include language that "resolv[es] liability to the United States or a state for 'some or all of a response action.'" 735 F.3d at 136. All terms of the 2005 Order, including the State's covenant not to sue pursuant to CERCLA, "remain in full force and effect," U.S. SOF ¶ 34, and there is no language indicating that CBY (as the party "replacing" Cranbury Development Corporation and Credit Agricole Asset Management) is excluded from that covenant.

Nor does CBY's contention that it is a BFPP (and therefore exempt from CERCLA liability) change the legal effect of the Order. "[P]arties often expressly refuse to concede liability under a settlement agreement, even while assuming obligations consistent with a finding of liability." *ASARCO II*, 866 F.3d at 1123. Nonetheless, "examination of § 113(f)(3)(B)'s plain language, with due consideration for CERCLA's structure and purpose" indicates that where a settlement agreement "decides with certainty and finality a PRP's obligations for at least some of its response actions and costs as set forth in the agreement," it constitutes a "resolution of liability" under 42 U.S.C. § 9613(f)(3)(B) regardless of a "settling party's refusal to concede liability." *ASARCO II*, 866 F.3d at 1125.[9]

Here, having made its agreement with the State (as set forth in the Order) and obtained the benefits thereof, CBY should not be allowed to claim it can escape the Order's legal effect. Many parties enter into settlements despite a belief that they are not liable. Ruling that CBY possesses a § 9607(a) claim for its costs pursuant to an administrative consent order would raise the specter of new claims by numerous other parties who would seek to disregard their prior settlements and claim innocence in order to pursue § 9607(a) claims. It also unfairly allows these parties, like CBY, to obtain the benefits of a settlement (*e.g.*, certainty, contribution protection, and a contribution claim, *see Atlantic Research*, 551 U.S. at 140-41) while refusing to pay its costs (sacrificing any hypothetical § 9607 claim and abiding by the terms of the agreement). In short, whether or not CBY could prove at trial all of the BFPP elements (which as discussed *infra* at Argument III it cannot), its entry into the Order resolved its *potential* liability to the State as the Site's current owner, and thus triggered § 9613(f)(3)(B)'s right of contribution.

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[9] *Accord Amcast Indus. Corp v. Detrex Corp.*, 2 F.3d 746, 749 (7th Cir. 1993) (once sued under § 9607(a), "Detrex could have counterclaimed [for contribution under section 9613(f)(1)] without giving up its main argument—that it is not a responsible person and therefore is not liable . . . ."); *United States v. Union Elec. Co.*, 64 F.3d 1152, 1167 (8th Cir. 1995) ("[N]o finding of liability is required . . . before the contribution interest arises."); *United States v. Albert Inv. Co., Inc.*, 585 F.3d 1386, 1397 (10th Cir. 2009) (same); *Companies for Fair Allocation v. Axil Corp.*, 853 Supp. 575, 582 (D. Conn. 1994) ("[R]egardless of whether the plaintiffs admit or allege [their own] liability, to the extent that they have incurred expenses and obligated themselves through the Consent Order, they are entitled to assert a claim for contribution under the statute").

C. A Contribution Claim under CERCLA Section 9613(f)(3)(B) Was CBY's Sole Means of Recovering Costs Related to the Order.

1. Cost recovery under CERCLA section 9607(a) and contribution under the procedural circumstances described in section 9613(f) are separate and distinct remedies.

The addition of § 9613(f) to the text of CERCLA in 1986 expressly confirmed the existence of a right of contribution, available to parties in two distinct situations. First, under 42 U.S.C. § 9613(f)(1), any person may seek contribution "during or following any civil action" under §§ 9606 or 9607(a). *Id.* § 9613(f)(1). Second, 42 U.S.C. § 9613(f)(3)(B) authorizes a contribution action by any person who "has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement." *Id.* § 9613(f)(3)(B). A pair of Supreme Court decisions in cases brought by private parties have addressed who may seek contribution under the above provisions and who may bring an action for cost recovery under § 9607(a).

First, in *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004), the Court held that § 9613(f)(1) authorizes a contribution action only by a party that has been the subject of a civil action under §§ 9606 or 9607(a). *Id.* at 168-70. Three years later, in a case involving a private PRP that had voluntarily cleaned up a site and then sued under both §§ 9607(a) and 9613(f) to recover its costs from the United States, the

Court considered a question left unaddressed in *Aviall*—whether a liable party that had not been subject to an action under §§ 9606 or 9607(a), and that therefore never possessed a contribution claim under § 9613(f)(1), could recover voluntarily incurred response costs from other liable parties under § 9607(a). *United States v. Atlantic Research Corp.*, 551 U.S. 128, 133 (2007). The Court concluded that the authorization of a cost recovery action by "any other person" in § 9607(a)(4)(B) was broad enough to include the plaintiff's claim. *Id.* at 135-36.

The *Atlantic Research* Court expressly left undecided the precise question presented here—whether costs incurred pursuant to a settlement of potential CERCLA liability, such as a consent decree following an action under §§ 9606 or 9607 or (as in this case) an administrative consent order, "are recoverable under § [9613(f)], § [9607(a)], or both." 551 U.S. at 139 n.6. But despite not reaching that issue, the Court elsewhere in the opinion emphasized that the remedies under §§ 9607(a) and 9613(f) are "clearly distinct," with § 9607(a) providing for a right to cost recovery "in certain circumstances" while § 9613(f) provides "*separate rights to contribution* in other circumstances." 551 U.S. at 138 (emphasis in original) (citing *Aviall*, 543 U.S. at 163 & n.3); *see also* 551 U.S. at 139 (the two remedies "complement each other by providing causes of action to persons in different procedural circumstances.") (internal quotation and citation omitted). The Court further affirmed that a PRP "eligible to seek contribution under § [9613(f)(1)] . . . cannot simultaneously seek to recover the same expenses under § [9607(a)]." 551 U.S. at 139; *see also id.* at 140 ("[A]

PRP could not avoid § [9613(f)]'s equitable distribution of reimbursement costs among PRPs by instead choosing to impose joint and several liability on another PRP in an action under § [9607(a)]. The choice of remedies simply does not exist."). Finally, the Court cited with approval the Eighth Circuit's view that to harmonize §§ 9607(a) and 9613(f) and to ensure the "continued vitality" of the latter provision, a PRP falling under § 9613(f) is "required to use" that section. 551 U.S. at 134 (internal quotation and citation omitted).

2. The Third Circuit and other circuits unanimously have held that costs incurred pursuant to CERCLA settlements are recoverable solely through section 9613(f)(3)(B).

Since *Atlantic Research*, numerous federal courts of appeals have addressed the question left open by the Supreme Court—i.e., whether a party that incurs costs pursuant to an administrative or judicial settlement of potential CERCLA liability may choose to seek recovery of those costs under 42 U.S.C. § 9607(a) rather than § 9613(f)(3)(B). *See, e.g.*, *ASARCO II*, 866 F.3d at 1117 (citing cases). Within the Third Circuit, the controlling case on this issue prior to *Aviall* and *Atlantic Research* was *New Castle County v. Halliburton NUS*, 111 F.3d 1116 (3d Cir. 1997), which had rejected the argument "that potentially responsible persons should have the choice to proceed under either section [9607] or section [9613]." *Id.* at 1123. The court reasoned that, if given the choice between the two remedies, PRPs "would quickly abandon section [9613] in favor of the substantially more generous provisions of section [9607]," and would thereby "render section 9613 a nullity." *Id.* For example, 42 U.S.C. § 9613 contains a statute of limitations for contribution actions that is shorter than the limitations period for some actions under § 9607(a).[10] The Third Circuit reasoned that if parties were allowed to choose between these provisions, they invariably would choose the longer limitations period. *See New Castle*, 111 F.3d at 1123; *see also infra* Argument II. Accordingly, the court held that because § 9613 "clearly . . . [wa]s available" to the plaintiff in *New Castle*—a private party that had signed a consent decree resolving potential CERCLA liability—it could not bring a § 9607(a) claim against other PRPs. *Id.* at 1123-24.

Following *Atlantic Research*, the Third Circuit considered this issue anew in *Agere Systems, Inc. v. Advanced Environmental Tech. Corp.*, 602 F.3d 204 (3d Cir. 2010), where it reviewed a district court's decision that parties had viable claims under both §§ 9607(a) and 9613(f) to recover their costs of work performed pursuant to consent decrees. *Id.* at 227. While acknowledging that the district court had correctly described this issue as an "open question of law" in the wake of *Atlantic Research*, the Third Circuit concluded that allowing CERCLA consent decree signatories to pursue their costs under § 9607(a) would be problematic because the defendants in such actions would be unable to counterclaim for contribution. The *Atlantic Research* Court

[10] *Compare id.* § 9613(g)(3) ("No action for contribution . . . may be commenced more than 3 years after (A) the date of judgment in any action under this chapter for recovery of such costs [for claims under § 9613(f)(1)], or (B) the date of an administrative order . . . or entry of a judicially approved settlement [for claims under section 113(f)(3)(B)]"), *with id.* § 9613(g)(2) (six-year statute of limitations for initial actions to recover "the costs referred to in section 9607").

had suggested that CERCLA defendants' ability to bring a contribution counterclaim "could blunt any inequitable distribution of costs" that might otherwise occur if PRPs sued under § 9607(a). But, as the Third Circuit noted, 42 U.S.C. § 9613(f)(2) provides that "[a] person who has resolved its liability to the United States or a State in an administratively or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." *Agere*, 602 F.3d at 228 (internal quotation marks omitted) (alteration in original). The Third Circuit concluded, therefore, that plaintiffs "who if permitted to bring a § [9607(a)] claim would be shielded from contribution counterclaims under § [9613(f)(2)], do not have any § [9607(a)] claims for costs incurred pursuant to consent decrees in a CERCLA suit," and instead must utilize the statutory contribution remedy. *Id.* at 229.

Although the Order here is an administrative order rather than a consent decree, it raises the same concern as in *Agere* because it likewise includes a provision which grants its signatories, including CBY, contribution protection with respect to matters addressed in the Order. Specifically, Paragraph 31 of the 2005 Order states as follows:

> It is the intent of the [State], [Cranbury Development Corporation] and Maxxam that this Administrative Consent Order constitutes an administrative settlement within the meaning of . . . 42 § 9613(f)(2) for the purpose of providing protection from contribution actions or claims under CERCLA as a result of releases of hazardous substances at the site as described in this Administrative Consent Order and Scope of Work.

U.S. SOF ¶ 9; *see also* 2006 Amendment ¶¶ 31, 34 (stating that CBY is "replacing" Cranbury Development Corporation as Respondent to the Order and that Order's terms "shall remain in full force and effect."). Thus, applying both *Agere* and the more recent *Trinity* decision discussed above—which made clear that an administrative consent order such as this one "resolves liability" within the meaning of § 9613(f)(3)(B)—it is clear under Third Circuit law that CBY cannot recover its costs related to matters addressed in the Order under § 9607(a).

In addition to the Third Circuit, "every federal court of appeals to have considered the question since *Atlantic Research* has concluded that a party who *may* bring a contribution action for certain expenses" under § 9613(f)(3)(B) "*must* use the contribution action" to recover such costs. *ASARCO II*, 866 F.3d at 1117 (Ninth Circuit opinion which cites *Agere,* as well as decisions from the Second, Sixth, Seventh, Eighth and Eleventh Circuits). These courts universally have recognized that § 9607(a) must be read in the context of Congress's later enactment of § 9613, which as shown above provides precise (and limited) mechanisms for PRPs in particular procedural circumstances to recover an equitable share of their response costs from other PRPs. Congress would not logically have enacted a statute that establishes an express, although limited, claim for contribution for PRPs, only to simultaneously allow them to bring claims independently under § 9607(a).[11]

[11] In addition to providing a shorter statute of limitations period for contribution actions than for initial actions to recover costs under § 9607(a), and allowing courts to

D. This Court's Earlier Denial of the United States' Motion to Dismiss Does Not Preclude Summary Judgment.

The United States moved for dismissal of CBY's First Claim for Relief under Fed. R. Civ. P. 12 (b)(6) on similar grounds to those argued above. Dkt. 12-2 at 8-18. The Court denied the motion "at this time," on the basis that "[a]t this early stage in the litigation proceedings [before discovery], it is sufficient to recognize that [CBY's] bona fide purchaser argument is plausible, and it complicates the true intentions of the [Order], which *may allow it to recover costs for contribution under [§ 9613(f)]*." Slip Op. dated Oct. 1, 2015 ("Opinion") at 10 (emphasis added). The Court thus made clear that its denial of the motion to dismiss was without prejudice to a renewed argument at a subsequent stage of the litigation, with the benefit of completed discovery, that the Order gave rise to a contribution remedy under § 9613(f)(3)(B).

The arguments above demonstrate that the text and structure of CERCLA's remedy provisions, as construed by the Third Circuit in *Trinity* and *Agere* and by all

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equitably allocate costs in contribution actions, Congress imposed other limitations on the contribution remedy. For example, it encouraged parties to settle with the United States by creating a bar to bringing contribution actions against persons that previously settled with the government. 42 U.S.C. § 9613(f)(2); *see also id.* §§ 9622(g)(5), (h)(4). In addition, it granted priority to the CERCLA rights of the United States over the rights of those persons who settle with the United States or a State. *See id.* § 9613(f)(3)(C). These provisions would lose their force if parties with an available contribution right could choose to sue under § 9607(a) instead. *See Aviall*, 543 U.S. at 167 (rejecting construction of CERCLA that would "violate the settled rule that we must, if possible, construe a statute to give every word some operative effect"); *Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, [courts] presume it intends its amendment to have real and substantial effect.")

other courts of appeals to consider the question, compel the conclusion that a party that signs an order like the one here may only recover its costs incurred related to matters addressed in that order under § 9613(f)(3)(B). This is so regardless of whether the party concedes or (as here) denies that it is actually liable, because the Order need only resolve the *potential* liability to the State that CBY otherwise would have as the Site's owner. *Supra* Argument I.B.[12] In any event, now that discovery is complete, the undisputed facts disqualify CBY from relying on the BFPP exemption from liability. *Infra* Argument III.

In short, because CBY had a right of contribution under § 9613(f)(3)(B) for costs related to matters addressed in the Order, it cannot bring a § 9607(a) claim to recover such costs. The Court therefore should dismiss CBY's First Claim for Relief as to all costs incurred after February 6, 2006, the effective date of the Order, as well as any pre-Order costs related to matters addressed in the Order.[13]

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[12] In its 2015 Opinion, the Court did not cite *Trinity* and did not attempt to reconcile with *Agere* its suggestion that CBY's assertion of BFPP status "complicated" the application of § 9613(f)(3)(B). Opinion at 7-8, 10.

[13] The issues remaining for trial with respect to such "pre-Order" costs would include: (1) whether such costs were related to the matters addressed by the Order and therefore are also subject to 42 U.S.C. § 9613(f)(3)(B) and its associated statute of limitations (*see infra* Argument II); (2) whether the United States is a liable party; (3) whether the pre-Order costs were necessary costs of response and were incurred consistent with the NCP; and (4) the appropriate allocation of any pre-Order costs found to be recoverable (if the Court agrees with Argument III *infra*).

II. CBY's CONTRIBUTION CLAIM IS UNTIMELY.

CBY's alternative Second Claim for Relief seeks contribution under 42 U.S.C. § 9613(f)(3)(B). CERCLA provides a three-year statute of limitations for contribution claims. *Id.* § 9613(g)(3)(B). CBY filed its Complaint on April 20, 2015, more than *nine years* after February 16, 2006, the date that the Order giving rise to its contribution right became effective. Thus, under § 9613(g)(3)(B)—or under any plausible alternative limitations period, should the Court disagree that § 9613(g)(3)(B) applies here—CBY's Second Claim for Relief is untimely and should be dismissed.[14]

A. Section 9613(g)(3)(B)'s Statute of Limitations Governs CBY's Contribution Claim.

The statute of limitations for contribution claims under CERCLA is three years following a judgment, administrative settlement or judicially-approved settlement. Section 9613(g)(3) of CERCLA reads, in full:

> **(3) Contribution**
>
> No action for contribution for any response costs or damages may be commenced more than 3 years after—
>
> **(A)** the date of judgment in any action under this chapter for recovery of such costs or damages, or
>
> **(B)** the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

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[14] The Court expressly did not address this statute of limitations question when it denied the United States' motion for Rule 12(b)(6) dismissal. Opinion at 10.

42 U.S.C. § 9613(g)(3). This provision's express reference to "action[s] for contribution" indicates that it provides the applicable statute of limitations for contribution claims under § 9613(f). Indeed, there are two other subsections within 42 U.S.C. § 9613(g) that contain different statutes of limitations, and neither of those provisions refers to "actions for contribution." *Id.* §§ 9613(g)(1) ("actions for natural resource damages"), (g)(2) ("actions for recovery of costs").

Section 9613(g)(3)(B) does not expressly state that its limitations period is triggered by entry into an administrative consent order issued pursuant to state law, such as the Order in this case. *See* 2005 Order (referring to state statutes as authority for issuing the Order); 2006 Amendment (same). Instead, § 9613(g)(3)(B) refers to three other events that trigger its limitations period: (1) issuance of an administrative order under 42 U.S.C. § 9622(g); (2) issuance of an administrative order under 42 U.S.C. § 9622(h); and (3) entry of a judicially approved settlement (*i.e.*, a consent decree). *See id.* § 9613(g)(3)(B). Prior to *Aviall*, some courts held that CERCLA contribution claims based on administrative settlements not expressly identified in § 9613(g)(3)(B) were subject to no statute of limitations at all. *See, e.g.*, *Reichhold Chems., Inc. v. Textron, Inc.*, 888 F. Supp. 1116, 1125-26 (N.D. Fla. 1995).[15] Others held that the six-year statute of limitations in § 9613(g)(2), which by its terms applies to "an

[15] *But see Agency Holding Corp. v. Malley-Duff & Assocs., Inc.,* 483 U.S. 143, 146-47 (1987) (noting that courts "do not ordinarily assume that Congress intended that there be no time limit . . . at all" on federal statutory causes of action) (internal quotation omitted).

initial action for recovery of the costs referred to in section 9607," should be construed to govern such contribution claims. *See, e.g.*, *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 924-25 (5th Cir. 2000). After the Supreme Court's decisions in *Aviall* and *Atlantic Research* and subsequent lower court cases applying those decisions, however, these older approaches are no longer good law.

In particular, courts have recognized that "[t]he face of the [SARA] amendments . . . reveals a design to codify one limitations period for contribution actions and another period for cost-recovery actions [i.e., claims that do not sound in contribution]." *RSR Corp. v. Commercial Metals Co.*, 496 F.3d 552, 558 (6th Cir. 2007). More precisely:

> one subsection [42 U.S.C. § 9613(f)] authorizes *contribution* actions, (entitled '(f) Contribution'); another places a limitations period on *contribution* actions, see 42 U.S.C. § 9613(g)(3) (entitled '(g) Period in which action may be brought' and '(3) Contribution'); whereas a third imposes a limitations period on *cost-recovery* actions, *see id.* § 9613(g)(2) (entitled 'Actions for recovery of costs').

RSR Corp., 496 F.3d at 558 (emphasis added); *see also Morrison Enters., LLC v. Dravo Corp.*, 638 F.3d 594, 609 (8th Cir. 2011) (concluding that a contribution claim under § 9613(f) cannot qualify as an "initial action for recovery of . . . . costs" that would be subject to the longer limitations periods in § 9613(g)(2)).

Moreover, the legislative history for the SARA amendments confirms that Congress did, in fact, intend § 9613(g)(3) to supply the limitations periods for all claims under § 9613(f). Specifically, "the conference report noted that [section

9613(g)(3)] 'prohibits the commencement of *any action for contribution* more than three years after the date of judgment in any civil action under this Act for recovery of costs or damages or more than three years after the date of entry of administrative or judicially approved settlements.'" *BASF Catalysts LLC v. United States*, 479 F. Supp. 2d 214, 224 (D. Mass. 2007), *quoting and adding emphasis to* H.R. Conf. Rep. No. 99-962 at 223 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3316.

The *Atlantic Research* decision reinforces this understanding regarding the parallel structure of §§ 9613(f) and 9613(g)(3) and the applicability of § 9613(g)(3)'s statute of limitations to contribution claims under § 9613(f). There, the Supreme Court determined that when a PRP "pays money to satisfy a settlement agreement or a court judgment" requiring that it reimburse other parties' response costs, and thereby acquires an express right of contribution against other PRPs under § 9613(f), such a PRP "cannot simultaneously seek to recover the same expenses under § [9607(a)]" and therefore "cannot choose the 6-year statute of limitations for cost recovery actions over the shorter limitations period for § [9613(f)] contribution claims." *Atlantic Research*, 551 U.S. at 139.

Even prior to *Aviall* and *Atlantic Research*, the Third Circuit had long held that § 9613(g)(3) supplied the limitations period for § 9613(f) contribution claims. *See New Castle County*, 111 F.3d at 1124. The Third Circuit's recent opinion in *Trinity* also supports this view of the statutory structure. Although that court was not directly presented with the statute of limitations question, as discussed above it held that an administrative consent order constituted a settlement of potential CERCLA liability within the meaning of § 9613(f)(3)(B) despite having been issued under state law. *Trinity*, 735 F.3d at 136. It would make no sense to conclude that such an order triggers the contribution right in § 9613(f)(3)(B)—as the Third Circuit squarely held—but not the associated statute of limitations. Indeed, where the contribution action arises from an administrative consent order, "the effective date of the [Order]"—here, February 16, 2006—"is the most logical and convenient triggering event" for that 3-year limitations period. *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757, 775 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 1161 (2015).

Courts in other jurisdictions have also widely agreed that "the decisions in [*Aviall*] and [*Atlantic Research*] eliminate the availability of the six-year statute of limitations set forth in section [9613(g)(2)] as an option for contribution cases." *Chitayat v. Vanderbilt Assoc.*, 702 F. Supp. 2d 69, 82 (E.D.N.Y. 2010). These courts applying *Aviall* and *Atlantic Research*'s analysis have concluded that the three-year limitations period of § 9613(g)(3) applies to § 9613(f) contribution claims even where the basis for the claim is a settlement of potential CERCLA liability of a type not identified in § 9613(g)(3)(B), including an administrative order issued under state law such as the Order here. *See, e.g.*, *ASARCO, LLC v. Celanese Chem. Co.*, 792 F.3d 1203, 1210-11 (9th Cir. 2015) ("*ASARCO I*") (concluding that § 9613(g)(3)(B) applies to all contribution claims arising from judicially-approved settlements even if they are not with "the United States or a State"); *Hobart,* 758 F.3d at 772-73 (§ 9613(g)(3)(B) applied to claim based on administrative consent order not expressly listed in § 9613(g)(3)(B)); *Northern States Power Co. v. City of Ashland*, 93 F. Supp. 3d 958, 969-71 (W.D. Wisc. 2015) (same); *Sandvik, Inc. v. Hampshire Partners Fund VI, L.P.*, Civ. A. No. 13-4667 (SDW) (MCA), 2014 WL 1343081, at *5-6 (D.N.J. Apr. 4, 2014) (same); *Chitayat*, 702 F. Supp. 2d at 82 (§ 9613(g)(3)(B) applied to claim based on an administrative settlement issued pursuant to state law); *BASF Catalysts*, 479 F. Supp. 2d at 220-24 (claim based on a RCRA administrative settlement, if viable, was subject to 3-year limitations period); *Carrier Corp. v. Piper*, 460 F. Supp. 2d 827, 842-43 (W.D. Tenn. 2006) (claim based on administrative order on consent was subject to 3-year limitations period).[16]

For these reasons, the Court should hold that § 9613(g)(3)'s three-year limitations period governs *all* section 9613(f) contribution claims, including CBY's claim under § 9613(f)(3)(B), and that CBY's claim is thus time-barred. Any contrary interpretation—e.g., that there is no limitations period or that § 9613(g)(2)'s limitations period applies—would be at odds with the Supreme Court's analysis of § 9613's text and structure and with Congress' clear intent when it enacted SARA.

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[16] *But see Exxon Mobil Corp. v. United* States, 108 F. Supp. 3d. 486, 514 (S.D. Tex. 2015) (district court sitting in Texas concluded it was bound to follow *Geraghty & Miller* as still-controlling Fifth Circuit precedent, but noted that "in the absence of *Geraghty*, this court might agree" that the limitations period in § 9613(g)(3)(B) applies to a § 9613(f)(3)(B) contribution claim based on an administrative settlement with a state).

B. Even if Section 9613(g)(3)(B) Does Not Expressly Apply, It Is the Most Analogous Limitations Period for CBY's Contribution Claim.

Congress' failure to provide express statutes of limitation for federal statutory causes of action is "a void which is commonplace in federal statutory law." *Board of Regents v. Tomanio*, 446 U.S. 478, 483 (1980); *see North Star Steel Co. v. Thomas*, 515 U.S. 29, 33 (1995). The Supreme Court has explained that courts should borrow and apply a federal statute of limitations

> when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.

North Star, 515 U.S. at 35 (internal quotations omitted).

Here, for multiple reasons, § 9613(g)(3)(B) is the most appropriate limitations period to apply to a § 9613(f)(3)(B) contribution claim such as CBY's. First, a uniform rule should apply to CERCLA contribution claims, but statutes of limitation for contribution actions under state law vary from state to state.[17] It would make little sense to have limitation periods vary depending upon the state law applicable to the federal judicial district in which the actions are filed, particularly since federal agencies may be sued under section 9613(f)(3)(B) in every federal judicial district. This would result in multiple statutes of limitations for the same type of contribution action, depending on the selected venue. Moreover, some CERCLA contribution cases against the United States "package" multiple claims arising from separate hazardous waste sites located in different states. *E.g.*, *E.I. DuPont de Nemours & Co. v. United States*, 508 F.3d 126, 130 & n.3 (3d Cir. 2007) (involving contribution claims at fifteen sites located in nine different states). There is no sound practical or policy reason to apply different limitations periods to different sites for the same type of federal claim in the same case.

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[17] Section 3(d) of the Uniform Contribution Among Tortfeasors Act ("UCATA"), contains a one-year limitations period that begins to run when the would-be contribution plaintiff has "discharge[d] by payment the common liability." However, the UCATA has been adopted by only eleven states, while forty-five states recognize rights to contribution, either legislatively or judicially, and there is no generally accepted statute of limitations period among those states. *See* Michael K. Sugrue, "Note: The Rights of Settling Tortfeasors Under The Massachusetts Contribution Among Tortfeasors Act," 35 *Suffolk Univ. L. Rev.* 571, 579-80 nn.53-54 (2001) (citing Jean Macchiaroli Eggen, "Understanding State Contribution Laws and Their Effect on the Settlement of Mass Tort Actions," *73 Tex. L. Rev.* 1701, 1750-77 (1995)).

Second, § 9613(g)(3)(B) clearly provides the most closely analogous federal statute of limitations for CBY's § 9613(f)(3)(B) contribution claim. As shown above, § 9613(g)(3)(B) specifically addresses certain contribution claims under § 9613(f)(3)(B). Moreover, it is designed to balance interests identical to those presented in *any* action for contribution arising under § 9613(f)(3)(B), whether or not the action is based on a type of settlement expressly identified as a triggering event in § 9613(g)(3)(B).

The only other possible statute of limitations within CERCLA is that set forth in § 9613(g)(2), which provides, in relevant part:

> **(2) Actions for recovery of costs**
>
> *An initial action for recovery of the costs referred to in section 9607 of this title* [42 U.S.C. § 9607] must be commenced—
>
> **(A)** for a removal action, within 3 years after completion of the removal action, * * *; and
>
> **(B)** for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

42 U.S.C. § 9613(g)(2) (emphasis added). A direct comparison of §§ 9613(g)(2) and 9613(g)(3)(B) shows that 9613(g)(3)(B) is the most closely analogous provision for any contribution claim filed under § 9613(f)(3)(B).

In particular, § 9613(g)(3) is specifically entitled "Contribution" and its text states that "*[n]o action for contribution*" may be commenced more than three years after the triggering events listed in that section. 42 U.S.C. § 9613(g)(3) (emphasis added). Section 9613(g)(2), by contrast, is entitled "Actions for recovery of costs" and makes no reference at all to contribution actions. Id. § 9613(g)(2); *see also* H.R. Conf. Rep. No. 99-962, at 223 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3316 (stating that § 9613(g)(2) is "the statute of limitations for civil actions for the recovery of response costs," while § 9613(g)(3) "prohibits the commencement of *any action for contribution* more than three years after the date of judgment [or] the date of entry of administrative or judicially approved settlements") (emphasis added). Similarly, while § 9613(g)(3)(B) expressly refers to several events that mark the accrual of a right to contribution—namely, entry of specified administrative or judicially approved settlements—§ 9613(g)(2) refers only to events that do *not* mark the accrual of a right to contribution under § 9613(f)(3)(B). *See* 42 U.S.C. § 9613(g)(2) (limitation periods begin to run upon the completion of a removal action or the initiation of on-site physical construction of a remedial action).[18] Thus, by its terms, § 9613(g)(2) does not apply to "contribution" claims arising under § 9613(f). As such, it could hardly offer the most closely analogous limitations provision for such claims.

In sum, even if the Court disagrees that § 9613(g)(3)(B) *directly* supplies the applicable limitations period, it should borrow that limitations period for the reasons stated above.

C. If the Court Concludes That CERCLA Provides No Applicable Limitations Period, then CBY's Contribution Claim Is Still Time-Barred under 28 U.S.C. § 2401(a).

If the Court concluded that none of the limitations periods in CERCLA applied to CBY's contribution claim against the United States, the claim would still be time-barred under 28 U.S.C. § 2401(a), which provides that "*every* civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." *Id.* (emphasis added); *see Green v. White*, 319 F.3d 560, 563 (3d Cir. 2003); *United States v. Sams*, 521 F.2d 421, 428 (3d

[18] It is a well-established rule that statutes of limitation for contribution actions begin to run when the would-be contribution plaintiff's cause of action accrues. *See, e.g., D'Onofrio Constr. Co. v. Recon Co.*, 255 F.2d 904, 907-08 (1st Cir. 1958); *Asdar Group v. Pillsbury, Madison & Sutro*, 99 F.3d 289, 295 (9th Cir. 1996).

Cir. 1975). As explained above, CBY did not file its Complaint until more than nine years after its contribution claim accrued (which occurred on February 16, 2006, the effective date of CBY's entry into the Order). Therefore, even if not subject to the limitations period in § 9613(g)(3)(B), CBY's contribution claim is still time-barred.

III. CBY IS A LIABLE PARTY

CBY contends that although it is the current owner of the Site, it is not a liable party under CERCLA because it is a bona fide prospective purchaser ("BFPP"). *See* Docket No. 18, Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss 1, 4, 12-14. CERCLA section 107(r) provides an exemption from liability to BFPPs, defined as persons who acquire ownership of a facility after January 11, 2002, and who can establish eight additional criteria. 42 U.S.C. §§ 9607(r), 9601(40). Those criteria include the following:

> (1) "[a]ll disposal of hazardous substances at the facility occurred before the person acquired the facility[,]"
>
> (2) "[t]he person made all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices . . . [,]"
>
> (3) "[t]he person exercise[d] appropriate care with respect to hazardous substances found at the facility . . . [,]" and
>
> (4) "[t]he person is not . . . affiliated with any other person that is potentially liable for response costs through . . . any contractual, corporate, or financial relationship . . . ."

Id. § 9601(40)(A), (B)(i), (D), (H)(i). At trial, CBY bears the burden of proving each of the eight BFPP criteria. *See Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F. Supp. 2d 431, 498-99 (D.S.C. 2011), *aff'd*, 714 F.3d 161 (4th Cir. 2013) (a party claiming the BFPP exemption from CERCLA liability must prove each of eight elements by a preponderance of the evidence); *Saline River Props., LLC v. Johnson Controls, Inc.*, 823 F. Supp. 2d 670, 685 (E.D. Mich. 2011). The United States is entitled to summary judgment that CBY is not a BFPP under the statute, and is instead a liable party, because CBY cannot establish the four above-listed BFPP requirements. *Id.* § 9601(40)(A), (B)(i), (D), (H)(i).[19]

A. CBY Cannot Establish That It Exercised Appropriate Care.

First, CBY cannot establish that it exercised appropriate care. CERCLA § 9601(40)(D) requires that BFPPs "exercise[] appropriate care with respect to hazardous substances . . . by taking reasonable steps to (i) stop any continuing release;

[19] The other four requirements are: (1) "[t]he person provide[d] all legally required notices with respect to the discovery or release of any hazardous substances . . . [,]" (2) "[t]he person provide[d] full cooperation, assistance, and access to persons that are authorized to conduct response actions . . . [,] (3) "[t]he person is in compliance with any land use restrictions established or relied on in connection with the response action . . . and does not impede the effectiveness or integrity of any institutional control employed . . . [,]" and (4) "[t]he person complies with any request for information or administrative subpoena issued" under CERCLA. See 42 U.S.C. 9601(40)(C), (E), (F)(i), (G). Three of these requirements are called "continuing obligations" and must be identified and documented. *See id.* § 9601(40)(C)-(F). CBY has produced no such documents, nor could CBY's environmental expert recall any such documents being developed. U.S. SOF ¶¶ 72-73. Thus, the United States may contest other elements of the BFPP defense at trial, if necessary.

(ii) prevent any threatened future release; and (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance." 42 U.S.C. § 9601(40)(D). CERCLA defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . ." *Id.* § 9601(22) (emphasis added).

By including the "appropriate care" element, "Congress intended to balance the desire to protect certain landowners from CERCLA liability with the need to ensure the protection of human health and the environment." Susan E. Bromm, Director, Office of Site Remediation Enforcement, Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA 9, 12 (Mar. 6, 2003) ("EPA BFPP Guidance"). *See also* S. Rep. No. 105-192, at 22, 1998 WL 251752 ("Any bona fide prospective purchaser that undertakes any [] response actions at the site must exercise appropriate care in the conduct of the response action.").

In *Ashley II*, for example, Ashley purchased contaminated property and then attempted to assert the BFPP defense. The district court concluded that Ashley had not exercised due care when it failed to address contaminated sumps and instead left them exposed to the elements, allowed a debris pile to accumulate on the site for a year without investigating its contents, and failed to adequately maintain a soil cover that was spread over the site. 791 F. Supp. 2d at 500-01; *see also id.* at 459, 469. The Fourth Circuit agreed, explaining that "Ashley's inactions clearly show that it failed to exercise 'appropriate care.'" *PCS Nitrogen*, 714 F.3d at 180; *see also Voggenthaler v. Maryland Square LLC*, 724 F.3d 1050, 1061 (9th Cir. 2013) (owner failed to establish the "appropriate care" element of the BFPP defense when it demolished a building thereby exposing contaminated soil to the elements and took no steps to remove the contaminated soil or limit the spread of the contaminants).

Like Ashley, CBY failed to take reasonable steps to stop continuing releases, prevent future releases, or prevent or limit human, environmental, or natural resource exposure to contaminants on the Site. Specifically:

- In November 2013, CBY's contractor discovered a seven-acre buried landfill that contained buried drums, waste containers, asbestos containing materials, hazardous substances that exceeded residential and industrial direct contact levels, wastes that exceeded hazardous waste screening levels, and solid waste. U.S. SOF ¶ 48. Redacted pursuant to Local Rule 5.3.

  Because of the asbestos, CBY's contractor had to decontaminate its screening equipment and implement air-monitoring measures, which detected the presence of asbestos. *Id.* ¶¶ 49-50.

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- Redacted pursuant to Local Rule 5.3.
- As early as 2007, Contaminants of Potential Ecological Concern were detected in samples taken from a nearby tributary. *Id.* ¶ 75. In 2016, CBY's environmental contractor reported that the potential transport of these contaminants over the Site and into the tributary will not be eliminated until CBY's supplemental barrier is in place. *Id.* ¶ 74. In his 2016 deposition, Viridian's Project Manager, Steve Ganch, admitted that construction of the supplemental barrier is market-driven and will not be completed for another three to four years. *Id.* ¶¶ 76-77.
- Redacted pursuant to Local Rule 5.3.

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CERCLA defines "hazardous substances" as any substance that appears on any one of six statutory lists of substances. *See* 42 U.S.C. § 9601(14). Additionally, EPA has designated a list of additional hazardous substances pursuant to CERCLA section 102(a). *See* 40 C.F.R. § 302.4, Table (EPA's list of hazardous substances). Aluminum phosphide, aluminum sulfate, asbestos, barium cyanide, chromium and chromium compounds, methylene chloride, and numerous volatile organic compounds (e.g. trichloroethane, benzene, toluene, and xylene) are all listed in EPA's regulation defining CERCLA "hazardous substances." *See* 40 C.F.R. § 302.4, Table. As explained above, CBY discovered these substances at the Site and released them by moving them to stockpiles and then to berms or other areas of the Site, or, in the case of the asbestos, emitted the contamination into the air by sifting the asbestos containing material. CBY also failed to take appropriate care to stop releases to the nearby tributary prior to installation of the supplemental barrier, or to determine whether the supplemental barrier would prevent future releases.

For all of these reasons, CBY cannot establish the "appropriate care" element of the BFPP defense.

B. Disposal of Hazardous Substances Occurred During CBY's Ownership of the Site.

CBY likewise cannot meet its burden of demonstrating that "*all* disposal of hazardous substances" occurred before CBY acquired the Site. *See* 42 U.S.C. § 9601(40)(A) (emphasis added). Under CERCLA, the definition of "disposal" is the same as it is under the Resource Conservation and Recovery Act ("RCRA"). 42 U.S.C. § 9601(29). Under RCRA,

> the term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 6903(3). "'Disposal' thus includes not only the initial introduction of contaminants onto a property but also the spreading of contaminants due to subsequent activity." *United States v. CDMG Realty Co.*, 96 F.3d 706, 719 (3d Cir. 1996). Any disposal, no matter how small, satisfies the definition. *See id.* ("[D]ispersal of contaminants need not reach a particular threshold level in order to constitute 'disposal'" since "[d]isposal consists of 'the discharge . . . or placing of *any* solid waste or hazardous waste into or on *any* land or water.") (quoting 42 U.S.C. § 6903(3) and adding emphasis). Moreover, several circuits, including the Third Circuit, have held that the act of moving contaminated soils constitutes "disposal." *See CDMG Realty Co.*, 96 F.3d at 720-22 (concluding that the dispersal of contaminants during soil testing may constitute disposal); *see also Bonnieview Homeowners*

Ass'n v. Woodmont Builders, LLC, 655 F. Supp. 2d 473, 490-92 (D.N.J. 2009) (collecting cases and holding that the defendant disposed of hazardous substances when it removed contaminated soils, combined and stockpiled them, then re-spread the soils on the site). *See also* S. Rep. No. 105-192, at 22 (1998), 1998 WL 251752 (Committee on Environment and Public Works Report) ("[A]ll deposition of hazardous materials must have occurred at the facility before the person acquired the property. Burying an intact drum containing hazardous substances is an act of deposition . . . .").

Indeed, in *Ashley II*, Ashley demolished structures on the site leaving in place contaminated cement pads, sumps, a trench, and underground pipes. 791 F. Supp. 2d at 460, 469. The demolition of the structures allowed runoff to collect in the pads, sumps, and trench, which overflowed regularly. *Id.* at 461, 469, 471. In concluding that Ashley could not establish the "no disposal" element of the BFPP defense, the court explained that because releases from these structures likely occurred, and Ashley had not tested to determine whether soil contamination occurred, Ashley could not meet its burden to prove that there had been no disposals after its acquisition of the site. *Id.* at 471, 499.

Here, it is undisputed that CBY disposed of hazardous substances at the Site.

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Although CERCLA's definition of hazardous substances expressly excludes petroleum, that exclusion does not apply to waste oil or petroleum mixed with other hazardous substances. *See* 50 Fed. Reg. 13,456, 13,460 (Apr. 4, 1985) (waste oil to which listed CERCLA substances have been added is not exempt); *Tosco Corp. v. Koch Indus.*, 216 F.3d 886, 893-94 (10th Cir. 2000) (petroleum comingled with other hazardous waste is not exempt). CBY did not perform an analysis of the petroleum product to determine what type of petroleum product may have been contained in the underground storage tank and therefore cannot establish that it is exempt under CERCLA's petroleum exemption.

Thus, the undisputed facts demonstrate that CBY disposed of hazardous substances at the Site. *See Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1512 (11th Cir. 1996) ("[A] 'disposal' may occur when a party disperses contaminated soil during the course of grading and filling a construction site."); *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1342 (9th Cir. 1992) (holding that allegations that party "excavated the tainted soil, moved it away from the excavation site, and spread it over uncontaminated portions of the property" were sufficient to support a claim that the party "disposed of" hazardous substances); *Bonnieview*, 655 F.

Supp. 2d at 490 (excavating, stockpiling, and respreading contaminated soils constitutes disposal). Accordingly, CBY cannot establish the "no disposal" element of the BFPP defense.

C. CBY Is Financially and Contractually Affiliated With Another PRP.

Next, CBY is financially and contractually affiliated with another PRP. Pursuant to CERCLA § 9601(40)(H), a BFPP cannot be "affiliated with any other person that is potentially liable for response costs at a facility through . . . any contractual, corporate, or financial relationship . . . ." 42 U.S.C. § 9601(40)(H)(i)(II). CERCLA does not define the phrase "affiliated with," but EPA has stated that "Congress intended the affiliation language to prevent a potentially responsible party from contracting away its CERCLA liability. . . ." EPA BFPP Guidance at 5. "On its face, the phrase has a broad definition, covering . . . many contractual, corporate, and financial relationships." *Id.* Likewise, the definition of "contract" is also very broad, encompassing, among other things, "agreements[s] between two or more parties, creating obligations that are enforceable or otherwise recognizable at law . . . ." Black's Law Dictionary 341 (8th ed. 2004). "Financial interest" is defined as "An interest involving money or its equivalent . . . ." *Id.* at 829.

As explained above, CERCLA defines potentially liable parties as including "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . . ." 42

U.S.C. § 9607(a)(2). Maxxam Group, Inc. ("Maxxam") is a liable party under this provision because it is a corporate successor to Unexcelled, the owner of the Site at the time of contamination. U.S. SOF ¶¶ 1, 5, 6; *United States v. General Battery Corp., Inc.*, 423 F.3d 294, 298 n.3 (3d Cir. 2005) ("The courts of appeals that have addressed the issue are unanimous in recognizing successor liability under CERCLA."). Additionally, Maxxam assumed the liabilities of Unexcelled by entering into the Order with the NJDEP to clean up the Site. U.S. SOF ¶¶ 6, 7, 13.

The undisputed facts show overwhelmingly that CBY is contractually and financially affiliated with Maxxam. On January 23, 2006, CBY signed the 2006 Amendment that removed the prior Site owner, Cranbury Development Corporation, and its shareholder, Credit Lyonnais Asset Management, as Respondents under the Order and replaced them with CBY. *Id.* ¶¶ 30-31. Maxxam remained a Respondent as it had been under the original 2005 Order. *Id.* ¶ 31. The 2006 Amendment was entered by the NJDEP on February 16, 2006. *Id.* ¶ 32. Under its terms, CBY and Maxxam are required to comply with the terms of the Order and are together responsible for cleaning up the Site. *Id.* ¶ 35.

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Finally, CBY and Maxxam entered into yet another agreement on January 30, 2006—an Environmental Indemnity Agreement. *Id.* ¶ 27. Under that agreement, CBY agreed to indemnify Maxxam from any claims regarding the environmental conditions at the Site, including the presence of MEC and hazardous substances, and to keep Maxxam informed regarding the environmental conditions at the Site. *Id.* ¶¶ 27-28.

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The indemnity was capped at $6 million from the date of closing to the date that NJDEP deems the cleanup complete, and $250,000 after that date. *Id.* ¶ 27. Additionally, the Environmental Indemnity Agreement excluded Maxxam's litigation against the United States. *Id.*

These undisputed facts demonstrate that CBY and Maxxam are plainly affiliated contractually and financially. Indeed, there can be no dispute that the agreements between CBY and Maxxam constitute contracts, most of which involved financial interests. *See, e.g., Weisman v. New Jersey Dep't of Human Servs.*, 982 F. Supp. 2d

386, 392 (D.N.J. 2013) (describing settlement agreements as "simple legal contract[s]"), *aff'd*, 593 Fed. Appx. 147 (3d Cir. 2014).[20]

Furthermore, the details of the relationship between the two companies demonstrate that CBY and Maxxam attempted to orchestrate a transfer of liability for the Site cleanup from Maxxam to CBY, and sought to preserve CBY's claims against the United States, thereby attempting to further transfer liability for any cost overruns from Maxxam to the United States through CBY's claim for unlimited future cost liability. In other words, the relationship between CBY and Maxxam caps Maxxam's contributions to the cleanup (Redacted pursuant to Local Rule 5.3) and yet preserves CBY's ability to recoup unanticipated additional costs from the United States, even after the United States resolved its potential liability to Maxxam in prior litigation. This is exactly the kind of liability-shifting relationship that Congress sought to avoid when it included the "no affiliation" element of the BFPP defense.

Indeed, in *Ashley II*, the court found a similar though less extensive relationship sufficient to preclude the BFPP defense. In that case, when Ashley purchased contaminated property from two other parties—Holcombe Enterprises and J. Henry

[20] To the extent CBY attempts to argue that its relationship with Maxxam was "created by the instruments by which title to the [Site was] conveyed or financed," and therefore is not a disqualifying relationship under the "no affiliation" element, that argument is without merit. *See* 42 U.S.C. § 9601(40)(H). Cranbury Development Corporation, not Maxxam, transferred title to the Site, and the contracts between CBY and Maxxam have nothing to do with financing that transfer. Instead, the contracts relate to a transfer of liability for the contamination at the Site.

Fair—the three parties entered into an "Environmental Indemnity," in which Ashley released Holcombe Enterprises (and related parties) and Fair from all claims including response costs incurred under environmental laws or related to the existence of hazardous materials on the property. *See* 791 F. Supp. 2d at 460-61. The court found that Ashley's contractual release of Holcombe and Fair was a prohibited affiliation that precluded the application of the BFPP defense. *Id.* at 502. This Court should likewise find that CBY's release, indemnification, and insurance coverage of Maxxam, as well as Maxxam's settlement payments to CBY and review of CBY's work, are a contractual and financial affiliation that disqualifies CBY from establishing BFPP status.

D. CBY Cannot Establish That It Made All Appropriate Inquiries Prior to Purchase.

Finally, CBY cannot establish that it made all appropriate inquiries prior to purchasing the Site. CERCLA § 9601(40)(B) requires a BFPP to "ma[k]e all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards . . . ." 42 U.S.C. § 9601(40)(B)(i). At the time CBY purchased the Site in January 2006, the "all appropriate inquiries" element could be demonstrated by compliance with the procedures of the American Society for Testing and Materials ("ASTM") Standard E1527. *See id.* § 9601(40)(B)(ii) (referring to 42 U.S.C. § 9601(35)(B)(ii) and (iv)); *id.*

§ 9601(35)(B)(iv) (requiring compliance with ASTM Standard E1527 for property purchased after May 31, 1997, until EPA issued regulations establishing the relevant standards and practices); *see also* EPA BFPP Guidance 5 (instructing parties to use the ASTM Standard E1527 until EPA issued regulations); 40 C.F.R. Part 312 (EPA's regulations effective Nov. 1, 2006); U.S. SOF ¶ 65.

The ASTM Standard E1527 version that would have been relevant during the time of CBY's pre-purchase inquiries—the 2005 version—requires (among other things) that the inquiries and results be documented in a report, typically called a Phase I Environmental Assessment. *See* Attachment A (ASTM Standard E 1527-05) 12-22. Phase I Environmental Assessments must document interviews with past and present owners or operators, reviews of historical information, searches for recorded liens against the property, and reviews of Federal, State, and local government databases. *See id.*

In his deposition, CBY's proffered environmental expert, Robert Zoch, identified two reports that could be relevant to CBY's compliance with the ASTM Standard E1527—a November 2005 Conceptual Remedial Action Workplan ("November 2005 Workplan"), and an unidentified March 2006 report, which is presumably the March 2006 Draft Remedial Investigation Report. U.S. SOF ¶ 66. The November 2005 Workplan makes no mention of the ASTM Standard E1527, and does not discuss interviews with prior owners or operators, review of historical information, searches for liens, or searches of government databases. *Id.* ¶ 67.

Instead, the report states that its purpose is "to document site conditions, present investigation results, and present the proposed remediation activities for the various areas of the Site and waste types identified as requiring remediation to achieve regulatory site closure that will allow commercial development." *Id.* ¶ 68. Thus, the November 2005 Workplan does not satisfy the ASTM Standard E1527 "all appropriate inquiries" requirements.

The March 2006 Draft Remedial Investigation Report similarly makes no mention of the ASTM Standard E1527 and states that is purpose is to "provide[] highlights of the data and observations from previous consultants . . [,] a summary of the URS Corporation material and explosives of concern (MEC) investigation/remediation efforts through December of 2005, and the site investigation conducted by ENSR AECOM (ENSR) in the summer of 2005." *Id.* ¶¶ 69, 71. Again, the report lacks critical elements required by the applicable standard: it does not discuss interviews with prior owners or operators, review of historical information, or searches for liens, and documents that only limited review of state and federal government databases was performed. *Id.* ¶¶ 69-70. Accordingly, neither of the reports identified by CBY's expert as relevant to the "all appropriate inquiries" criterion satisfy the ASTM Standard E1527.

In summary, under the undisputed facts of this case, CBY cannot establish numerous elements of the BFPP defense. First CBY failed to exercise appropriate care with respect to hazardous substances at the Site. Second, CBY disposed of hazardous substances during its ownership of the Site. Third, CBY had a contractual and financial relationship with Maxxam, a potentially responsible party, by which CBY and Maxxam attempted to transfer Maxxam's liability to CBY and the United States. Finally, CBY failed to make "all appropriate inquiries" before acquiring the Site. Thus, CBY is not a BFPP, and is liable under CERCLA as the Site's owner.

CONCLUSION

For the reasons stated above, the United States is entitled to summary judgment dismissing CBY's First Claim for Relief as to all post-Order costs and any pre-Order costs related to matters addressed in the Order, and dismissing CBY's Second Claim for Relief in its entirety. Additionally, the United States is entitled to a summary judgment finding that CBY is a liable party.

Respectfully submitted,

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Dated: November 9, 2017 By: /s/ Brian H. Lynk

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